

## CRAVATH, SWAINE &amp; MOORE LLP

STUART W. GOLD  
JOHN W. WHITE  
EVAN R. CHESLER  
MICHAEL L. SCHLER  
RICHARD LEVIN  
KRIS F. HEINZELMAN  
B. ROBBINS KISSLING  
ROGER D. TURNER  
PHILIP A. GELSTON  
RORY O. MILLSON  
FRANCIS P. BARRON  
RICHARD W. CLARY  
WILLIAM P. ROGERS, JR.  
JAMES D. COOPER  
STEPHEN L. GORDON  
DANIEL L. MOSLEY  
JAMES C. VARDELL, III  
ROBERT H. BARON  
KEVIN J. GREHAN  
C. ALLEN PARKER  
SUSAN WEBSTER  
DAVID MERCADO  
ROWAN D. WILSON  
CHRISTINE A. VARNEY  
PETER T. BARBUR

SANDRA C. GOLDSTEIN  
THOMAS G. RAFFERTY  
MICHAEL S. GOLDMAN  
RICHARD HALL  
JULIE A. NORTH  
ANDREW W. NEEDHAM  
STEPHEN L. BURNS  
KEITH R. HUMMEL  
DAVID J. KAPPAS  
DANIEL SLIFKIN  
ROBERT I. TOWNSEND, III  
WILLIAM J. WHELAN, III  
SCOTT A. BARSHAY  
PHILIP J. BOECKMAN  
ROGER G. BROOKS  
WILLIAM V. FOGG  
FAIZA J. SAEED  
RICHARD J. STARK  
THOMAS E. DUNN  
MARK I. GREENE  
DAVID R. MARRIOTT  
MICHAEL A. PASKIN  
ANDREW J. PITTS  
MICHAEL T. REYNOLDS  
ANTONY L. RYAN

WORLDWIDE PLAZA  
825 EIGHTH AVENUE  
NEW YORK, NY 10019-7475

TELEPHONE: +1-212-474-1000  
FACSIMILE: +1-212-474-3700

CITYPOINT  
ONE ROPEMAKER STREET  
LONDON EC2Y 9HR  
TELEPHONE: +44-20-7453-1000  
FACSIMILE: +44-20-7860-1150

## WRITER'S DIRECT DIAL NUMBER

(212) 474-1280

GEORGE E. ZOBITZ  
GEORGE A. STEPHANAKIS  
DARIN P. MCATEE  
GARY A. BORNSTEIN  
TIMOTHY G. CAMERON  
KARIN A. DEMASI  
LIZABETHANN R. EISEN  
DAVID S. FINKELSTEIN  
DAVID GREENWALD  
RACHEL G. SKAISTIS  
PAUL H. ZUMBRO  
JOEL F. HEROLD  
ERIC W. HILFERS  
GEORGE F. SCHOEN  
ERIK R. TAVZEL  
CRAIG F. ARCELLA  
TEENA-ANN V. SANKOORIKAL  
ANDREW R. THOMPSON  
DAMIEN R. ZOUBEK  
LAUREN ANGELILLI  
TATIANA LAPUSHCHIK  
ERIC L. SCHIELE  
ALYSSA K. CAPLES  
JENNIFER S. CONWAY  
MINH VAN NGO

KEVIN J. ORSINI  
MATTHEW MORREALE  
JOHN D. BURETTA  
J. WESLEY EARNHARDT  
YONATAN EVEN  
BENJAMIN GRUENSTEIN  
JOSEPH D. ZAVAGLIA  
STEPHEN M. KESSING  
LAUREN A. MOSKOWITZ  
DAVID J. PERKINS  
JOHNNY G. SKUMPIJA  
J. LEONARD TETI, II  
D. SCOTT BENNETT  
TING S. CHEN  
CHRISTOPHER K. FARGO  
KENNETH C. HALCOM  
DAVID M. STUART

---

SPECIAL COUNSEL  
SAMUEL C. BUTLER  
GEORGE J. GILLESPIE, III

---

OF COUNSEL  
PAUL C. SAUNDERS

November 13, 2014

Toliver v. Cavalli et al; 1:10-cv-0822 (RJS)(JCF); 1:10-cv-05355 (RJS)(JCF)

Dear Judge Sullivan:

On behalf of Plaintiff Michel Toliver, we write in response to Defendants' November 12, 2014 letter. We believe that dismissal of 10-cv-0822 and 10-cv-5355 is wholly unwarranted under the circumstances.

*First*, as Defendants recognize, dismissal with prejudice is a "harsh remedy" to be used only in "extreme situations". *Koehl v. Greene*, 424 F. App'x 61, 62 (2d Cir. 2011). Such "extreme situations" are not present here. The documents referenced by Mr. Toliver on the stand, were immediately produced to Defense counsel and Defense counsel will have the opportunity to cross-examine Mr. Toliver on each of these documents during the remainder of their examination.

*Second*, there were only four documents in the set produced to Defense counsel yesterday evening that were responsive to the Bronx District Attorney line of questioning. Mr. Toliver testified on the record that he produced the December 3, 2011 document to Defendants. (11/12/2014 Trial Tr. at 278:13-279:3.) With respect to the (i) March 26, 2012; (ii) January 2, 2014 and (iii) September 23, 2014 documents, each of those is dated after the close of discovery in 10-cv-5355 and none is responsive to Defendants' document requests.<sup>1</sup> Contrary to Defendants' statement, Plaintiff does dispute that these documents should have been produced.

<sup>1</sup> In their November 12, 2014 letter, Defendants identify two document requests to which they believe these documents were responsive. (See Letter from J. Marutollo to H. Sullivan, dated November 12, 2014 at 3 n.3.) The first, document request "8" asked that

*Third*, to the extent Defendants are now claiming that they did not have the opportunity to investigate Mr. Toliver's position that he filed a complaint with the Bronx District Attorney related to the May 20, 2010 incident, defense counsel stated on the record yesterday that they had initially planned to call representatives from the Bronx District Attorney's Office in order to testify that Mr. Toliver had not filed a complaint in connection with the May 20, 2010 incident. (11/12/2014 Trial Tr. at 284:13-24.) Plaintiff has no objection if Defendant seeks to introduce these witnesses now.

Ultimately, there are numerous ways for this trial to proceed fairly without resorting to the drastic remedy of dismissal. Dismissal under these circumstances would be unjustified and we respectfully request that Your Honor deny Defendants' request for such relief.

Respectfully,



Helam Gebremariam

Honorable Richard J. Sullivan  
United States District Court  
Southern District of New York  
Thurgood Marshall United States Courthouse  
40 Foley Square, Room 2104  
New York, NY 10007

---

Plaintiff produce "all documents that relate to all complaints *made* by plaintiff to any government agency . . ." (*Id.*) (emphasis added). The three documents at issue were not documents *made* as the date of the document requests (or as of the date of the close of discovery) and therefore, need not have been produced. Similarly with respect to "2", the request asks that Plaintiff "produce all documents regarding the Incident . . . that *are* in plaintiff's possession, custody or control". Again, these documents were not in plaintiff's possession, custody or control at the time of the document requests because they did not yet exist.

Copies to:

**Joseph A. Marutollo, Esq.**  
Assistant Corporation Counsel  
Special Federal Litigation Division  
New York City Law Department  
100 Church Street  
New York, NY 10007

**Steven M. Silverberg, Esq.**  
Assistant Corporation Counsel  
Special Federal Litigation Division  
New York City Law Department  
100 Church Street  
New York, NY 10007

**VIA EMAIL & ECF**